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IN THE

Supreme Court of the United States

OCTOBER TERM 1984

WILLIAM J. SCOTT, on his own behalf and on behalf of all persons similarly situated,

Petitioner,

vs.

CITY OF HAMMOND, INDIANA; UNITED STATES ENVIRONMENTAL PROTECTION AGENCY; DOUGLAS M. COSTLE, Administrator of the United States Environmental Protection Agency; and the HAMMOND-MUNSTER SANITARY DISTRICT,

Respondents.

REPLY IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

JOSEPH V. KARAGANIS*
A. BRUCE WHITE
KATHLEEN M. DONAHUE
KARAGANIS, GAIL & WHITE LTD.
150 North Wacker Drive
Suite 2500
Chicago, Illinois 60606
(312) 782-1905
Attorneys for Petitioner

* Counsel of Record

Pandick Midwest Inc., Chicago • 454-7600

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RESPONDENTS HAVE FAILED TO ADDRESS THE SERIOUS CONSTITUTIONAL CONTRADICTIONS CREATED BY THE COURT OF APPEALS DECISION BELOW

The responses to the petitions for certiorari[1] evoke the confusion of a famous Abbott and Costello dialogue: "Who's on first? What's on second?" On the one hand respondents and the Court of Appeals explicitly acknowledge that nothing in the Constitution or the Clean Water Act prevents the application of state law to this action and that a state court applying state law can award tort damages and injunctive relief more stringent than required by the Clean Water Act. In virtually the same breath, respondents argue that the Constitution prohibits the application of state law, and that this Court should disregard the clear intent of Congress that state law should govern actions charging tortious conduct by dischargers.

Stripped of all hyperbole, this is nothing more than a suit by a citizen of one state against a citizen of another state for tortious injury. The federal Clean Water Act clearly does not provide a remedy for tortious conduct; the state laws of both Indiana and Illinois do. It is undisputed by any of the parties that Congress intended that actions for the tortious conduct of dischargers be governed by state law, not federal law.

The responses to the petitions for certiorari seek to obscure these simple facts with grand but vague pleas to concepts of state "sovereignty" and "federalism". Yet it is federalism—as expressly embodied in the Tenth Amendment—that preserves to the states the power to regulate harmful conduct, where such power is not preempted by federal law.

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[1] Hammond Respondents' Brief In Opposition To The Petitions For Writs of Certiorari To The United States Court of Appeals For the Seventh Circuit in Nos. 84-21 and 84-38 and Brief In Opposition To the Petition For A Writ of Certiorari filed by the Milwaukee Respondents in No. 84-38.

There is no question that a citizen of Indiana could bring an action based in tort against Hammond under Indiana law for the same conduct as occurred in this case. Under the law declared by the Seventh Circuit and by this Court in *Middlesex County Sewerage Authority* v. *National Sea Clammers Association,* 453 U.S. 1 (1981), nothing in the Clean Water Act or the Constitution prevents the Indiana citizen from seeking damages and injunctive relief more stringent than the Clean Water permit requirements under Indiana state tort law. See decision below at App. A-21 n.6. The fact that the medium, here Lake Michigan, is regulated by federal law does not preclude the application of state law to tortious conduct causing injury to an Indiana citizen. The state law is used to determine both liability and remedy. The remedy can be damages and injunctive relief more stringent than the permit issued under the Clean Water Act, where the restrictions in the permit are insufficient to prevent continuing injury.[2]

Further, there appears to be common agreement by both the Seventh Circuit and by respondent Hammond that the injured *Illinois* citizen could bring an action grounded in tort against Hammond under Indiana *state* law.

> Nothing in our decision precludes the application of Wisconsin or *Indiana law* by state or federal courts in one of those states at the suit of out of state parties affected by discharges in that state.
>
> Court of Appeals decision App. B-3.

> The Court of Appeals also correctly recognized that nothing in *Milwaukee I* or the FWPCA prevented someone from asking the courts of a state in which the discharges were being made to apply *its law* to those discharges. This state remedy was specifically preserved in FWPCA section 510 (33 U.S.C. Section 510).
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> Respondent Hammond's brief at 7.

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[2] Contrary to popular belief, the permit system as administered under the Clean Water Act currently permits raw sewage and raw industrial chemicals to be discharged out of municipal sewers as "best practical technology".

> Also, more stringent relief can be sought *under Indiana law* in Indiana courts.
>
> Respondent Hammond's brief at 8.

Thus both the Court of Appeals and the respondent Hammond agree that there is nothing in the Constitution or the Clean Water Act which precludes the application of *state* tort law to determine both liability and remedy in a suit by either the Indiana or the Illinois victim. Moreover, Hammond and the Court of Appeals acknowledge that Congress explicitly left such remedies for tortious discharges to determination by state law--not federal law.

If neither the Constitution, nor the Clean Water Act prohibit the application of state law in this controversy as acknowledged by both the Court of Appeals and Hammond, the Tenth Amendment to the Constitution and the Rules of Decision Act require the federal courts to apply state law in this controversy. *Erie* v. *Tompkins,* 304 U.S. 64 (1938). Moreover, unless some magical federal choice of state law rule can be gleaned from the Constitution or the Clean Water Act, the choice of law rules of the state in which the district court sits must be used to determine which state law applies. *Klaxon* v. *Stentor Electric Mfg. Co.,* 313 U.S. 487 (1941).

Having expressly agreed that *state* tort law (albeit Indiana) is available to Petitioner, an Illinois citizen, respondent Hammond does a complete logical reversal. Hammond claims that under footnote 6 of *Milwaukee I* only federal law, not state law can apply:

> Any disputes arising from conflicting resource uses permitted by different States can only be resolved through *federal* law.
>
> Respondent Hammond Brief at 6-7.

This statement—that only federal law, not state law, can govern this dispute—is directly contradictory to Hammond's and the Court of Appeals' acknowledgment that Indiana state law could

be used to determine liability and remedy in this controversy. The statement contradicts the express intent of Congress that state law govern liabilities and remedies for tortious conduct, and that such state law not be preempted by federal law.

Moreover, if as Hammond contends, there is some unwritten constitutional rule which prohibits the application of state tort law to this controversy, the Court of Appeals erred in holding that Indiana state tort law remedies were available. If the Constitution somehow precludes the application of state law to this dispute, there is no basis for applying either Illinois or Indiana state law. Any such constitutional prohibition applies with equal force to the law of either state—Illinois or Indiana.[3]

But such a holding would create more constitutional problems. If, as Hammond concedes, a citizen of Indiana could invoke state tort law to seek damages and injunctive relief, a court declared doctrine that an Illinois citizen was barred from invoking state tort law, in the same case, would clearly run afoul of the Privilege and Immunities Clause. U.S. Constitution, art. IV, sec. 2, cl. 1.

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[3] Whenever the tortious acts of Hammond are challenged, Hammond wraps itself in claims of psuedo "sovereignty". But if this concept of "sovereignty" is somehow embodied in the Constitution, overriding the framework of the Tenth Amendment and the Full Faith and Credit Clause, the pseudo sovereignty of Illinois is equally threatened by application of Indiana law to the dumping of sewage and grease onto Illinois territory. The whole pseudo sovereignty issue is simply a makeweight. There is no difference between applying the law of the victim's state to state officials who cause injury in the victim's state in auto or other physical torts and applying the victim's state law to non-state officials or private citizens dumping sewage onto Illinois beaches. Certainly, the "sovereignty" of the State of Nevada was even more at stake in *Nevada* v. *Hall*, 440 U.S. 410, *rehearing den.*, 441 U.S. 917 (1979), and the "sovereignty" of the State of Indiana, was even more at stake in *Maroon* v. *Department of Mental Health*, 411 N.E.2d 404 (Ind. App. 1980).

Moreover, such a holding would fly in the face of the expressed Congressional intent that state tort law was not preempted by the Clean Water Act and should be applied. We thus face the situation where a footnote dictum in this Court's *Milwaukee I* opinion is being used as the lever for negating the express Congressional allocation of power between the federal government and the states as set forth in the Clean Water Act.[4] Indeed, if footnote 6 is really a constitutional mandate instead of a footnote dictum, it is doubtful that Congress had the constitutional authority to direct the application of state law to tort disputes as state law.

In a brief rife with internal contradiction, respondent Hammond argues that the Constitution does—and does not—prohibit the application of state law to this controversy. If this Court accepts the position taken by the Court of Appeals and one of Hammond's positions—that nothing in the Constitution or the Clean Water Act prohibits the application of state tort law to this controversy—then the application and choice of state law must be governed by the Tenth Amendment, the Rules of Decision Act and *Erie*. If this Court accepts the contradictory position also articulated by Hammond—that some unwritten constitutional dogma prohibits the application of state law—then there is really only one way to honor the Congressional intent that state tort law apply, and the Court of Appeals decision that Indiana law be applied to this controversy.

This Court could declare that the "state" tort law preserved by Congress is, in reality, federal law which selectively incorporates state tort law under the aegis of the Clean Water Act. See the cases cited at p. 22 of the Petition in this case. But

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[4] As this Court has acknowledged, the passage of the Act and the consideration of the issue of state vs. federal law for tort actions was predicated on the then outstanding opinion of this Court in *Ohio* v. *Wyandotte Chemicals Corp.*, 401 U.S. 493 (1971), which followed *Erie*.

as described at pp. 22-26 of the Petition, such federalization of state tort law would create a whole raft of ancillary problems which neither Congress nor this Court intended.

Indeed, the strange constitutional argument urged by Hammond has already spawned bizarre principles of venue, *in personam* jurisdiction, and limits on judicial power. At pp. 11-12 of Hammond's response, Hammond tells this Court that an Illinois court (or by implication a federal district judge sitting in a diversity case in Illinois), cannot be trusted to apply Indiana law to this controversy. Acceptance of this preposterous claim would ravage the foundations of our constitutional system in which each state and federal court is duty bound to faithfully apply whatever state law is deemed applicable.

Further, Hammond conveniently ignores several facts about this suit. Hammond ignores the distinction between liability and choice of remedy.[5] Further, Hammond ignores the fact that the remedies sought by Scott include both damages and injunctive relief. Even as to injunctive relief, Hammond ignores a well-established body of case law that allows a court in one jurisdiction to order actions in another jurisdiction where, as here, there is *in personam* jurisdiction over the defendant.[6] Finally, Hammond acknowledges that an Indiana

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[5] *Davis* v. *Passman*, 442 U.S. 228 (1979); *City of Evansville, Ind.* v. *Kentucky Liquid Recycling, Inc.*, 604 F.2d 1008, 1019 (7th Cir. 1979), *cert. denied sub nom., Louisville and Jefferson County Metropolitan Sewer District* v. *City of Evansville, Ind.*, 444 U.S. 1025 (1980).

[6] It has long been recognized that once courts possess *in personam* jurisdiction over the defendant, the Court has the power to order the defendant to perform remedial acts outside the territorial jurisdiction of the Court. See, *The Salton Sea Cases* (*California Development Co.* v. *New Liverpool Salt Co.*), 172 F. 792 (9th Cir.), *cert. denied*, 215 U.S. 603 (1909); *Steele* v. *Bulova Watch Co.*, 344 U.S. 280, 289 (1952); E. Mesner, *Jurisdiction of A Court of Equity Over Persons To Compel the Doing of Acts Outside The Territory Limits of the State*, 14 Minn. L. Rev. 494 (1930); Restatement (Second) of Conflict of Laws, Section 53 (1971).

court applying its own tort law could impose requirements more stringent than does the federal law. Under diversity jurisdiction, what possible theory prohibits a federal district court in Illinois, or an Illinois state court, from applying Indiana law in a similar fashion—where, as here, *in personam* jurisdiction exists in Illinois?

Hammond's position becomes even more preposterous when it asks this Court to disregard the very Indiana state choice of law rule which would govern this case. (Hammond response, p. 13.) In *Maroon* v. *Department of Mental Health,* Indiana officials released a homicidal mental patient who crossed the state line into Illinois and killed an Illinois citizen. In a wrongful death action against Indiana state officials for the wrongful death in Illinois, the Indiana court held that Illinois law would apply under the *lex loci delicto* rule followed by Indiana. Hammond would have the federal court reject the state choice of law rule and in its place dictate a federal choice of law rule mandating the application of the law of the tortfeasor's state.

CONCLUSION

Like the sorcerer's apprentice, the Court of Appeals' decision has spawned a phalanx of constitutional anomalies sweeping aside a well-ordered constitutional and statutory framework for choice of law, *in personam* jurisdiction, and venue. It is essential that this Court grant the petitions for certiorari and restore order.

Respectfully submitted,

JOSEPH V. KARAGANIS*
A. BRUCE WHITE
KATHLEEN M. DONAHUE
KARAGANIS, GAIL & WHITE LTD.
150 North Wacker Drive
Suite 2500
Chicago, Illinois 60606
(312) 782-1905
Attorneys for Petitioner

* Counsel of Record